

Before the  
Federal Communications Commission  
Washington, DC 20554

FCC 14M-18

In the Matter of	)	10039 EB Docket No. 11-71
	)	
<b>MARITIME COMMUNICATIONS/LAND</b>	)	File No. EB-09-IH-1751
<b>MOBILE, LLC</b>	)	FRN: 0013587779
	)	
Participant in Auction No. 61 and Licensee of	)	
Various Authorizations in the Wireless Radio	)	
Services	)	
	)	
Applicant for Modification of Various	)	Application File Nos.
Authorizations in the Wireless Radio Services	)	0004030479, 0004144435,
	)	0004193028, 0004193328,
	)	0004354053, 0004309872,
Applicant with <b>ENCANA OIL AND GAS (USA),</b>	)	0004310060, 0004314903,
<b>INC.; DUQUESNE LIGHT COMPANY, DCP</b>	)	0004315013, 0004430505,
<b>MIDSTREAM, LP; JACKSON COUNTY</b>	)	0004417199, 0004419431,
<b>RURAL MEMBERSHIP ELECTRIC</b>	)	0004422320, 0004422329,
<b>COOPERATIVE; PUGET SOUND ENERGY,</b>	)	0004507921, 0004153701,
<b>INC.; ENBRIDGE ENERGY COMPANY,</b>	)	0004526264, and 0004604962
<b>INC.; INTERSTATE POWER AND LIGHT</b>	)	
<b>COMPANY; WISCONSIN POWER AND</b>	)	
<b>LIGHT COMPANY; DIXIE ELECTRIC</b>	)	
<b>MEMBERSHIP CORPORATION, INC.;</b>	)	
<b>ATLAS PIPELINE-MID CONTINENT, LLC;</b>	)	
<b>AND SOUTHERN CALIFORNIA REGIONAL</b>	)	
<b>RAIL AUTHORITY</b>	)	
	)	
For Commission Consent to the Assignment of	)	
Various Authorizations in the Wireless Radio	)	
Service	)	

**MEMORANDUM OPINION AND ORDER**

Issued: June 17, 2014

Released: June 17, 2014

**Preliminary Statement**

1. The Enforcement Bureau ("Bureau") and Maritime Communications/Land Mobile, LLC ("Maritime," collectively "movants") have agreed on questions of material fact. The Bureau and Maritime now jointly move for summary decision on Issue G, based on these

agreed facts. Issue G was set for hearing to determine whether site-based Automated Maritime Telecommunications System (“AMTS”) stations licensed to Maritime were timely constructed as required by Section 80.49(a) of the Commission's rules; and whether operations of these site-based facilities have permanently discontinued pursuant to Section 1.955(a) of the Commission's rules.<sup>1</sup>

2. The Bureau and Maritime agree on the material facts related to the construction and operational status of 16 site-based AMTS facilities: WHG750, KAE889-3 (Livingston Peak), KAE889-4 (Rainier Hill), KAE889-13 (Portland), KAE889-20 (Mount Constitution), KAE889-30 (Gold Mountain), KAE889-34 (Capital Peak), KAE889-48 (Tiger Mountain), WRV374-14 (Selden), WRV374-15 (Verona), WRV374-16 (Allentown), WRV374-18 (Valhalla), WRV374-25 (Perrinville), WRV374-33 (One World Trade Center), WRV374-35 (Rehobeth), and WRV374-40 (Hamden). Maritime and the Bureau have also agreed by stipulation to cancelation of 73 other site-based licenses.

3. For reasons set forth below, the Presiding Judge grants summary decision for each of the 16 licensed facilities on the construction question of Issue G. However, summary decision is denied as to the issue of permanent discontinuance. In addition, for reasons stated below, the Limited Joint Stipulation Concerning Issue G Licenses, dated December 2, 2013, is rejected.

### **Maritime Motion**

4. On May 8, 2013, Maritime alone filed a forerunner motion for summary decision. There, Maritime argued that Issue G should be ruled moot as to licenses or facilities that Maritime already agreed to cancel or delete.<sup>2</sup> Maritime also argued that summary decision was appropriate on the question of whether authorizations initially issued to Waterway Communications System, Inc. (“Watercom Licenses”) were timely constructed as required by Section 80.49(a) of the Commission's rules.<sup>3</sup> Maritime further argued that the non-Watercom Licenses were timely constructed and that the Commission's AMTS license rules were ambiguous in that they failed to provide Maritime with sufficient notice of what would constitute permanent discontinuance under Section 1.955(a) of the Commission's rules.<sup>4</sup>

5. The Bureau agreed with Maritime in part, and opposed Maritime in part. The Bureau agreed that Issue G should be ruled moot as to authorizations and facilities Maritime agreed to cancel or delete, and that the Watercom Licenses had been timely constructed.<sup>5</sup> The Bureau also agreed that all but three of the non-Watercom Licenses were timely constructed as required by Section 80.49(a).<sup>6</sup> However, the Bureau opposed Maritime's argument that the Commission's AMTS license rules were ambiguous.<sup>7</sup> The Bureau asked the Presiding Judge to

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<sup>1</sup> See *Maritime Communication/Land Mobile, LLC*, Order to Show Cause, Hearing Designation Order, and Notice of Opportunity for Hearing, EB Docket No. 11-71, 26 FCC Rcd 6520, 6547 ¶ 62(g) (2011) (“HDO”).

<sup>2</sup> Maritime's Motion for Summary Decision on Issue G at 4-5 (filed May 8, 2013).

<sup>3</sup> *Id.* at 6; see also *infra* ¶ 11.

<sup>4</sup> *Id.* at 6-12.

<sup>5</sup> Enforcement Bureau's Response to Maritime's Motion for Summary Decision on Issue G at 2-5 (filed May 21, 2013).

<sup>6</sup> *Id.* at 5-9.

<sup>7</sup> *Id.* at 9-17.

reject Maritime's legal argument and instead "consider the factual record developed in the hearing proceeding before reaching a conclusion on Maritime's site-based licenses."<sup>8</sup>

6. Mr. Warren Havens filed an Opposition to Maritime's Motion in which he failed to raise a genuine issue of fact in contesting summary decision.<sup>9</sup> Even so, Mr. Havens had represented earlier in the proceeding that he was participating *pro se*. The Presiding Judge surmised that Mr. Havens remained *pro se* at this time as Mr. Havens struggled with his filing, drafting a pleading that was lacking in its presentation of arguments. In deference to Mr. Havens' believed *pro se* status, Maritime's motion was substantially denied. It was granted only for those facilities Maritime had agreed to cancel or delete.<sup>10</sup> Months later, it was divulged that Mr. Havens was receiving undisclosed assistance from counsel at the time he filed his opposition, as well as at the time the Presiding Judge released his ruling.<sup>11</sup>

### Joint Motion

7. The Joint Motion of Enforcement Bureau and Maritime for Summary Decision on Issue G ("Joint Motion") was filed on December 2, 2013.<sup>12</sup> It was accompanied by a Limited Joint Stipulation Concerning Issue G Licenses ("Joint Stipulation" or "Stipulation"). Pinnacle Wireless ("Pinnacle") and Duquesne Light Company ("Duquesne") filed pleadings in support of the Joint Motion. Mr. Havens responded with his Opposition to Joint Motion of Enforcement Bureau & Maritime for Summary Decision on Issue G ("Opposition") on December 16, 2013.<sup>13</sup> Choctaw Telecommunications, LLC and Choctaw Holdings, LLC (together "Choctaw") filed a Motion for Leave to File Declaration from Liquidating Agent on December 19, 2013.<sup>14</sup> On December 23, 2013, the Bureau simultaneously moved for leave to file a response to Mr. Havens' filing and submitted its Reply to Mr. Havens' Opposition to Joint Motion for Summary Decision ("Bureau's Reply").<sup>15</sup>

8. *Order*, FCC 14M-9, released on March 12, 2014, requested additional information from the Bureau and Maritime that the Presiding Judge deemed necessary for ruling on their Joint Motion. The Bureau and Maritime filed their Joint Response to Order, FCC 14M-9 ("Joint Response") on March 26, 2014. Pinnacle filed a pleading in support of this Joint Response on

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<sup>8</sup> *Id.* at 17 ¶ 26.

<sup>9</sup> Opposition to Motion for Summary Decision (filed May 22, 2013).

<sup>10</sup> *Memorandum Opinion and Order*, FCC 13M-16.

<sup>11</sup> See Letter from Neil S. Ende, Esq., dated January 6, 2014; James Ming Chen's Notice of Limited or Special Appearance, dated January 6, 2014.

<sup>12</sup> On June 2, 2014, the Commission publicly released a version of the Joint Motion that disclosed previously redacted material in response to requests by Mr. Havens under the Freedom of Information Act. See Letter to Mr. Warren Havens RE: FOIA Control Nos. 2014-306, 2014-320, 2014-324 (dated May 9, 2014). As it is no longer considered confidential for purposes of this proceeding, that material is not redacted in this *Memorandum Opinion and Order*.

<sup>13</sup> Mr. Havens' filing was untimely, as it was submitted after the 5:30 pm filing deadline set for this proceeding. *Order*, FCC 12M-55 at 2.n.2. Mr. Havens has been warned that he will be strictly held to filing deadlines. *Memorandum Opinion and Order*, FCC 13M-22 at 3 ¶ 5. However, that warning came three days after Mr. Havens filed his Opposition. Mr. Havens' Opposition is considered on its merits as a courtesy to Mr. Havens, but will be the last such courtesy provided to him. Late filings will only be considered if good cause is shown.

<sup>14</sup> For good cause shown, Choctaw's motion is granted.

<sup>15</sup> For good cause shown, the Bureau's motion is granted.

April 9, 2014. That same day, Mr. Havens filed his own Response to the Joint Response (“Mr. Havens’ Response”). The Bureau and Maritime jointly moved to strike Mr. Havens’ Response on April 16, 2014.<sup>16</sup> Puget Sound Energy, Inc. (“Puget”) replied to Mr. Havens’ filing on April 24, 2014.<sup>17</sup> Mr. Havens requested that the Presiding Judge accept his Opposition and Reply to the motion to strike on April 25, 2014.<sup>18</sup> On May 5, 2014, Mr. Havens filed an Opposition and Response to Puget’s reply.<sup>19</sup>

### **Motion to Strike**

9. *Order*, FCC 14M-9, requested that Maritime and the Bureau submit additional information or explanation, with evidentiary support as appropriate, on topics that included the operational status of specific facilities and their positions on legal questions.<sup>20</sup> The Presiding Judge instructed the other parties that they may respond to the submissions of Maritime and the Bureau, but that those responses must be limited to the content of Maritime’s and the Bureau’s filings.<sup>21</sup> Maritime and the Bureau filed a motion to strike arguing that Mr. Havens’ Response was not limited to the narrow questions raised by *Order*, FCC 14M-9.<sup>22</sup> Mr. Havens argues that his Response addressed issues within the scope of the Joint Response, including issues surrounding Maritime’s current leases and “evidence and determination of ‘construction’ ‘operation’ and ‘service’ area.”<sup>23</sup>

10. The Presiding Judge agrees with Maritime and the Bureau’s motion to strike. A review of Mr. Havens’ Response shows that he has blatantly ignored the *Order*’s instructions. His 62 page pleading and numerous accompanying exhibits expound on many topics that are unrelated to the substance of the Joint Response, including some that have no connection to Issue G. While some portions of Mr. Havens Response may arguably relate to the substance of the Joint Response, it is not for the Presiding Judge to serve as Mr. Havens’ editor and separate the wheat from his chaff. To do so places an unreasonable burden on the Presiding Judge and his staff, is unfair to the movants, and encourages Mr. Havens to continue to disregard instructional rules directives. Accordingly, Mr. Havens’ Response is struck in its entirety.

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<sup>16</sup> Joint Motion to Strike Havens’ Response to the Joint Response of the Enforcement Bureau and Maritime to *Order*, FCC 14M-9 (filed April 16, 2014).

<sup>17</sup> Reply of Puget Sound Energy to “Havens Response to the Joint Response of the Enforcement Bureau & Maritime to *Order*, FCC 14M-9” (filed April 25, 2014). Puget’s Motion for Leave to File Reply is granted solely to the extent that it provides information that updates the record, as the pleading to which it seeks to respond is struck in its entirety. *See infra* ¶¶ 9-10.

<sup>18</sup> Opposition and Reply to Joint Motion to Strike Havens’ Response to the Joint Response of the Enforcement Bureau & Maritime to *Order*, FCC 14M-9 and Contingent Requests to Accept. His request to accept and consider his filing is granted.

<sup>19</sup> Mr. Havens requests therein that the Presiding Judge strike Puget’s updating of the record in response to recent factual assertions made by Mr. Havens on the grounds that Puget had failed to make timely updates to the record. This request is absurd on its face and thus summarily denied. His request for additional time to reply to Puget is also denied, as the Presiding Judge does not deem further substantive comment on Puget’s operational status to be necessary or useful for ruling on the Joint Motion.

<sup>20</sup> *Order*, FCC 14M-9.

<sup>21</sup> *Id.* at 2.

<sup>22</sup> Joint Motion to Strike Havens’ Response to the Joint Response of the Enforcement Bureau and Maritime to *Order*, FCC 14M-9 at 3 ¶ 3.

<sup>23</sup> Opposition and Reply to Joint Motion to Strike Havens’ Response to the Joint Response of the Enforcement Bureau and Maritime to *Order*, FCC 14M-9 and Contingent Requests to Accept at 4.

## Status of Maritime's Licenses

11. *Watercom Licenses.* On December 10, 1987, the Commission released its *Memorandum Opinion and Order* in the matter of the renewal of AMTS Station Licenses WHG 700–WHG 703 and WHG 705–WHG 754 held by Waterway Communications System, Inc. (“Watercom”),<sup>24</sup> which are now held by Maritime. The Commission recognized that Watercom had completed construction of the system associated with these licenses and that the system was providing service.<sup>25</sup> The Commission further noted that Watercom: (1) was required to meet a schedule of construction; (2) regularly kept the Commission apprised of the status of construction; and (3) put the system into operation within the time allowed.<sup>26</sup> In that way, “there can be no question of spectrum hoarding or other dereliction in its inauguration of service.”<sup>27</sup>

12. *Mobex Licenses.* On December 28, 2004, the Wireless Telecommunications Bureau (“WTB”) released an *Order* responding to petitions filed by Mr. Havens seeking to deny applications filed by Mobex Network Services, LLC (“Mobex”) to renew some licenses and transfer other licenses that it held.<sup>28</sup> Those licenses included KAE889, WRV374, and WHG750,<sup>29</sup> which are now held by Maritime. At that time, Mr. Havens argued that the station activation notices filed by Mobex were defective and thus the stations should not be deemed to be timely constructed.<sup>30</sup> WTB rejected this argument. In anticipation of an AMTS auction, WTB had reviewed AMTS construction and operational information and “confirmed that the vast majority of the facilities at issue were timely constructed.”<sup>31</sup> Those facilities that were not constructed were deleted.<sup>32</sup> WTB concluded that:

it would not further the public interest to deny Mobex’s renewal and transfer applications *en masse* based on defects in the activation notices for facilities that were in fact timely constructed. Moreover, even had the Bureau not brought its licensing information up to date, we believe that the defects and variations alleged by Havens would not constitute sufficient reason for denying the renewal or transfer applications.<sup>33</sup>

13. *Pinnacle Lease.* Call signs WRV374-14 (Selden), WRV374-15 (Verona), WRV374-16 (Allentown), WRV374-18 (Valhalla), WRV374-25 (Perrinville), and WRV374-33 (One World Trade Center) are subject to a lease agreement executed between Mobex and Pinnacle prior to Maritime acquiring the licenses in late 2005.<sup>34</sup> Pinnacle built a 19 site statewide network within the contours of WRV374-15 and WRV374-25.<sup>35</sup> Neither Pinnacle nor

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<sup>24</sup> *Waterway Communications System, Inc.*, Memorandum Opinion and Order, 2 FCC Rcd 7317 (1987).

<sup>25</sup> *Id.* at 7317 ¶ 4.

<sup>26</sup> *Id.* at 7319 ¶ 16.

<sup>27</sup> *Id.*

<sup>28</sup> *Mobex Network Services, LLC*, Order, 19 FCC Rcd 24939 (WTB 2004).

<sup>29</sup> *Id.* at 24939 n.4.

<sup>30</sup> *Id.* at 24941 ¶ 6.

<sup>31</sup> *Id.* at 24941-42 ¶ 6.

<sup>32</sup> *Id.* at 24942 ¶ 6.

<sup>33</sup> *Id.*

<sup>34</sup> Joint Motion of Enforcement Bureau and Maritime for Summary Decision on Issue G, at 13 ¶ 23; Exhibit 5 at 2-3, 7; Joint Response at 2 ¶ 3.

<sup>35</sup> Joint Motion, Exhibit 5 at 4; Exhibit 7 at 2.

Maritime are operating facilities at the locations specified by the licenses.<sup>36</sup> Of the 40 AMTS frequency pairs licensed to Maritime in New Jersey, Pinnacle provides service on 12 frequency pairs to the New Jersey Sports and Entertainment Authority (“NJSEA”) at the Meadowlands Complex, which includes Giants Stadium and the New Jersey Devils’ hockey arena, and on 20 frequency pairs to the New Jersey Turnpike Authority (“NJTA”).<sup>37</sup> The network is relied upon by NJSEA and NJTA for critical infrastructure and public safety communications.<sup>38</sup> Due to overlapping 38 dBu service contours and 20 dBu protection contours, the operation of Pinnacle’s network necessarily restricts the operations of other Maritime sites with contours overlapping northern New Jersey operations.<sup>39</sup> Those sites include WRV374-16, WRV374-18, and WRV374-33.<sup>40</sup> Pinnacle continues to operate this network.<sup>41</sup>

14. *Later Lessees.* Call signs WHG750, KAE889-3 (Livingston Peak), KAE889-4 (Rainier Hill), KAE889-13 (Portland), KAE889-20 (Mount Constitution), KAE889-30 (Gold Mountain), KAE889-34 (Capital Peak), and KAE889-48 (Tiger Mountain) were operating at the time they were acquired by Maritime.<sup>42</sup> However, service was discontinued at each of these call signs on December 31, 2007, because demand for maritime and/or land mobile communication services fell off.<sup>43</sup> Maritime was able to locate lessees for these call signs through its marketing efforts.

15. *Evergreen School District.* Effective October 30, 2008, Maritime leased call signs KAE889-3 and KAE889-13 to Evergreen School District (“Evergreen”), which is located in southwest Washington state.<sup>44</sup> Evergreen uses the spectrum associated with KAE889-3 to support a 2-site, 3 Channel Motorola/Trident Passport radio system that coordinates student transportation, safety, and emergency communications with all schools and key personnel.<sup>45</sup> The use of KAE889-13 is currently restricted (i.e. not operating) due to overlapping service and interference contours.<sup>46</sup> Evergreen continues to operate its network on the spectrum associated with KAE889-3, at the specified site.<sup>47</sup>

16. *Duquesne Light Company.* Effective February 18, 2010, Maritime leased call sign WHG750 to Duquesne.<sup>48</sup> Duquesne constructed multiple facilities within the license’s coverage area and began operating as early as May 2010.<sup>49</sup> Duquesne still operates these

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<sup>36</sup> Joint Response at 2 ¶ 3.

<sup>37</sup> Joint Motion, Exhibit 5 at 4; Exhibit 7 at 2.

<sup>38</sup> Joint Motion, Exhibit 5 at 4.

<sup>39</sup> Joint Motion, Exhibit 7 at 2.

<sup>40</sup> *Id.*

<sup>41</sup> Joint Motion, Exhibit 5 at 4.

<sup>42</sup> Joint Motion, Exhibit 8 at 6 ¶ 9.

<sup>43</sup> *Id.*

<sup>44</sup> Joint Motion, Exhibit 15; Exhibit 8 at 2 ¶ 1.

<sup>45</sup> Joint Motion, Exhibit 17 at 3 ¶ 6.

<sup>46</sup> Joint Motion, Exhibit 7 at 4 ¶ 8.

<sup>47</sup> Joint Motion, Exhibit 17 at 3 ¶ 5.

<sup>48</sup> Joint Motion, Exhibit 12; Exhibit 13 at 2; Exhibit 14 at 2 ¶ 8.

<sup>49</sup> Joint Motion, Exhibit 13 at 2-3 ¶ 1, 4-5 ¶¶ 5-6.

facilities.<sup>50</sup> However, neither Duquesne nor Maritime are operating the facility at the location specified by the license,<sup>51</sup> but rely on fill-in sites.

17. *Puget Sound Energy, Inc.* Effective May 20, 2010, KAE889-4, KAE889-20, KAE889-30, KAE889-34, and KAE889-48 were leased to Puget to construct a private mobile radio network system to service approximately 2,000 vehicular and portable radio units used by Puget's employees and contractors for communications related to the construction, operation, and maintenance of Puget's electric and gas utility operations.<sup>52</sup> This system uses spectrum it leases from Maritime with spectrum leased from two of Mr. Havens' entities, Environmental LLC and Skybridge Spectrum Foundation.<sup>53</sup> Puget's system uses fill-in stations that it constructed and operates.<sup>54</sup> The fill-in stations became fully operational in September 2013.<sup>55</sup> Neither Maritime nor Puget are operating the licensed facilities.<sup>56</sup> Maritime's lease with Puget is still in effect.<sup>57</sup>

18. *Marketed Licenses.* When Maritime acquired WRV374-35 (Rehobeth) and WRV374-40 (Hamden), it intended to include them as part of the expansion of PassPort systems constructed and operated by Motorola in the Chicago, New York/New Jersey, Philadelphia, and Baltimore/Washington, DC markets.<sup>58</sup> For business reasons, Maritime began actively marketing these call signs to entities such as AMTRAK, the MetroNorth Rail Road, and the Massachusetts Bay Transportation Authority for use with Positive Train Control.<sup>59</sup> Since 2008, these licenses have been continuously marketed for Maritime through Spectrum Bridge.<sup>60</sup>

### **Standard for Summary Decision**

19. Section 1.251 of the Commission's rules provides in pertinent provisions:

(a)(1) Any party to an adjudicatory proceeding may move for summary decision of all or any of the issues set for hearing. The motion shall be filed at least 20 days prior to the date set for commencement of the hearing. The party filing the motion may not rest upon mere allegations or denials but must show, by affidavit or by other material subject to consideration by the presiding officer, that there is no genuine issue of material fact for determination at the hearing.

(b) Within 14 days after a motion for summary decision is filed, any other party to the proceeding may file an opposition or a countermotion for summary decision.

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<sup>50</sup> *Id.* at 3 ¶¶ 4, 6 ¶ 9.

<sup>51</sup> Joint Response at 3 ¶ 3.

<sup>52</sup> Joint Motion, Exhibit 18; Exhibit 19 at 5-6 ¶ 1.

<sup>53</sup> Joint Motion, Exhibit 19 at 5 ¶ 1.

<sup>54</sup> *Id.*; Joint Response at 5 ¶ 7.

<sup>55</sup> Reply of Puget Sound Energy to "Havens Response to the Joint Response of the Enforcement Bureau & Maritime to Order, FCC 14M-9," at 8 ¶ 2 (Declaration of PSE Radio System Operation).

<sup>56</sup> Joint Response at 5 ¶ 7.

<sup>57</sup> Joint Motion, Exhibit 18; Exhibit 19 at 5 ¶ 1.

<sup>58</sup> Joint Motion at 13 ¶ 21; Joint Motion, Exhibit 4 at 4-5; Exhibit 20 at 1-2.

<sup>59</sup> Joint Motion, Exhibit 20 at 2.

<sup>60</sup> *Id.*

A party opposing the motion may not rest upon mere allegations or denials but must show, by affidavit or by other materials subject to consideration by the presiding officer, that there is a genuine issue of material fact for determination at the hearing, that he cannot, for good cause, present by affidavit or otherwise facts essential to justify his opposition, or that summary decision is otherwise inappropriate.<sup>61</sup>

20. Also required to be considered are certain principles and policies set forth in the Commission Report and Order in the proceeding entitled *In the Matter of Summary Decision Procedures*.<sup>62</sup> Of particular importance are portions regarding the appropriateness of summary decision where a party participates *pro se* and the case is complex.<sup>63</sup> Also to be considered is the Commission's policy allowing a presiding judge broad authority to "go forward with a hearing, regardless of the showing made, if the nature of proceeding and of circumstances" persuade that "a hearing is desirable."<sup>64</sup> Affidavits shall be interpreted strictly, with special concern for the reliability of the affiants.

### **Opposition to Summary Decision**

21. Mr. Havens raises procedural arguments in opposing the grant of summary decision. His arguments were carefully considered but are found to be unpersuasive. Discussion of the opposing arguments and reasons for their rejection are stated and dismissed below.

### ***Havens' Consent Order Theory Is Rejected***

22. Mr. Havens argues that the Joint Motion is a disguised request for a consent order.<sup>65</sup> This argument is unconvincing. A simple reading of the Joint Motion informs in clear language that Maritime and the Bureau ask for summary decision and not the issuing of a consent order. The styling and substance of the Joint Motion are what one would expect to see in a motion for summary relief. It relies on selected evidence in arguing that no genuine issue of material fact exists under Issue G that requires factual determination.<sup>66</sup> More to the point, it does not request that the Presiding Judge examine any written consent agreement or any proposed consent order to determine whether the "interests of timely enforcement or compliance, the nature of the proceeding, and the public interest permit" disposing of all issues in this proceeding.<sup>67</sup> In fact, the Bureau's reply to Mr. Havens explicitly states that Maritime and the Bureau do not seek approval of any proposed consent order.<sup>68</sup> And in his opposition pleading, Mr. Havens admits that Maritime and the Bureau only seek summary decision, and not any form of settlement.<sup>69</sup> Accordingly, the Joint Motion of the movants will be considered as a motion for

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<sup>61</sup> 47 C.F.R. §§ 1.251(a)-(b).

<sup>62</sup> 34 F.C.C.2d 485 (1972).

<sup>63</sup> *Id.* at 488 ¶ 6.

<sup>64</sup> *Id.* at 487 ¶ 5.

<sup>65</sup> Opposition at 9-11.

<sup>66</sup> See 47 C.F.R. § 1.251(a)(1).

<sup>67</sup> See 47 C.F.R. § 1.93(b).

<sup>68</sup> Enforcement Bureau's Reply to Mr. Havens' Opposition to Joint Motion for Summary Decision at 2 ¶ 2.

<sup>69</sup> Opposition at 98.



summary decision.

23. Mr. Havens colorfully contends that the language of the Joint Motion and Joint Stipulation “bristle with the language of negotiated resolution.”<sup>70</sup> He notes similarities between Maritime seeking an expedited resolution of this proceeding and references in Section 1.93(b) of the Commission’s rules to “timely enforcement” and “prompt disposition.”<sup>71</sup> He points out perceived similarities between the Joint Stipulation’s statement that Maritime does not make any admissions on the merits and the language of Section 1.94(c) of the Commission’s rules that states that the agreement underlying a consent order does not constitute an admission.<sup>72</sup> However, the language that Mr. Havens cites is not misplaced in a motion for summary decision. Nor is it inconsistent with a request for summary decision. It is common for parties to move for a decision summarily because parties want a speedy resolution. It is also common for parties to clarify the nature of stipulations to which they agree in order to simplify issues in a proceeding. The mere use of such language fails to demonstrate that a pleading styled as a motion for summary decision is best read as a clandestine quest for a consent order. Indicia and substance remain the best indicators of how a motion should be categorized. Here, the indicia and substance of the Joint Motion best comports with what Maritime and the Bureau present it to be, *i.e.*, a motion for summary decision.

24. Mr. Havens even points to statements that Maritime and the Bureau have made that they were in discussions to resolve Issue G.<sup>73</sup> He alleges that the Joint Motion and Joint Stipulation are “*quid pro quo*” agreements wherein Maritime retains some licenses if it agrees to cancel others.<sup>74</sup> Should that description of the negotiations be serendipitously accurate, it has no relevance to the issue at hand. Merely negotiating does not transmute stipulations and motions into negotiated consent agreements. To repeat the obvious, Maritime and the Bureau have not asked the Presiding Judge to accept a negotiated agreement *via* consent order procedures.<sup>75</sup> Rather, they seek a summary decision *on the merits*. No slight of hand could bypass the difficult factual burden that they must satisfy. Finally, the Presiding Judge is not aware of any authority, nor has Mr. Havens provided any authority, advancing the proposition that parties are barred from seeking a summary decision if they have negotiated the resolution of Issue G by means other than full litigation.<sup>76</sup>

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<sup>70</sup> *Id.* at 11.

<sup>71</sup> *Id.* at 12.

<sup>72</sup> *Id.* at 12-13.

<sup>73</sup> *Id.* at 10-11.

<sup>74</sup> *Id.* at 12.

<sup>75</sup> See 47 C.F.R. § 1.93(a).

<sup>76</sup> Mr. Havens also argues that the Joint Motion cannot succeed because Section 1.93 bars the negotiation of consent orders with respect to matters that involve a party’s basic statutory qualifications to hold a license. Opposition at 14 (citing 47 C.F.R. § 1.93(b)). He asserts that the Presiding Judge “has confirmed that Issue G implicates questions of Maritime’s qualifications.” Opposition at 19 (citing *Memorandum Opinion and Order*, FCC 13M-16 at 9 n.66). Even if Maritime and the Bureau did seek a consent order with regard to Issue G, Mr. Havens’ argument would not succeed. Issue G involves a determination of “whether the licenses for any of Maritime’s site-based AMTS stations have canceled automatically for lack of construction, or for permanent discontinuance of operation.” HDO at 6546 ¶ 61. As stated in prior orders, Issue G does not involve any determination as to whether Maritime is qualified to hold Commission licenses. See, e.g., *Memorandum Opinion and Order*, FCC 13M-16 at 9 n.66; *Memorandum Opinion and Order*, FCC 13M-22 at 6 ¶ 14. All issues involving determinations of Maritime’s qualifications to hold Commission licenses have been stayed pending Commission action on Maritime’s *Second Thursday* filing. See

### ***Bankruptcy Arguments Are Not Apropos***

25. Mr. Havens speculates that Maritime cannot negotiate a resolution with the Bureau because Section 1.93(b) requires that consent orders be negotiated “with a party.”<sup>77</sup> He theorizes that Maritime is subject to the plans and orders of the United States Bankruptcy Court for the Northern District of Mississippi and therefore lacks capacity to “negotiate, much less enter, a consent order.”<sup>78</sup> Therefore, Maritime cannot qualify to be a “party” to any consent agreement under Section 1.93(b).<sup>79</sup> Mr. Havens further speculates that Maritime’s proposed settlement aims “to effect an unlawful *de facto* transfer of control” of its licenses in violation of Section 1.93(b) of the Commission’s rules and Section 310(d) of the Communications Act.<sup>80</sup> The Presiding Judge is not convinced or in any way won over by this otherworldly line of argument.

26. To his credit and in a moment of candor, Mr. Havens concedes that his arguments rest on the premise that “any voluntary resolution of Issue G . . . must be based on the Commission’s procedures for a consent order.”<sup>81</sup> Unfortunately, his premise is flawed. As detailed many times above, Maritime and the Bureau may seek summary decision without utilizing the consent order procedures. The Joint Motion does not anywhere propose a consent order. Mr. Havens has cited no authority for finding that negotiation between Maritime and the Bureau bars summary decision. His bankruptcy arguments for barring summary decision are rejected.<sup>82</sup>

### ***Multiple Motions for Summary Decision Are Permitted***

27. Maritime filed two previous motions for summary decision on August 31, 2012, and on May 8, 2013. The current Joint Motion, Filed on December 2, 2013, is the third attempt to resolve certain non-character aspects of this proceeding by summary decision.<sup>83</sup> Mr. Havens argues that it is Commission policy that “motion[s] for summary decision should be filed once, prior to hearing, and not otherwise.”<sup>84</sup> He also argues that “the possibility of repeated motions as the hearing progresses, during continuances or otherwise, should be precluded.”<sup>85</sup> The Commission is concerned about the potential for delay in attending to the submission and consideration of repeated motions for summary decision.<sup>86</sup> Mr. Havens is also aware of a subsequent Commission *Order* that amended Commission rules to permit the filing of a

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*Order*, FCC 13M-6. In any event, resolution of Issue G via consent order is not found to be barred by Section 1.93(b) on this basis.

<sup>77</sup> Opposition at 23.

<sup>78</sup> *Id.* at 24, 25-26.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 25, 34-38.

<sup>81</sup> *Id.* at 23.

<sup>82</sup> However, many of Mr. Havens’ bankruptcy-related arguments for denying summary decision are further considered as they apply to the Joint Stipulation. *See infra* pp. 23-26 ¶¶ 67-72.

<sup>83</sup> Opposition at 39.

<sup>84</sup> *Id.* (quoting *Summary Decision Procedures*, 34 F.C.C.2d at 490 ¶ 12).

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

summary decision motion after a hearing has begun.<sup>87</sup> He states that such motions shall be filed only with permission or invitation of a presiding officer, so as to safeguard against strategic delays.<sup>88</sup> Mr. Havens believes that the Joint Motion should be rejected because the Presiding Judge has neither permitted nor invited Maritime or the Bureau to file a summary decision motion.<sup>89</sup> He maintains that such “[r]epeated, inappropriate use of summary decision procedures arguably constitutes abuse, which the presiding officer exercises broad authority to patrol.”<sup>90</sup> However, further analysis rejects Mr. Havens’ conclusion.

28. In addressing this erroneous view, note that the policy statements cited by Mr. Havens were expressly concerned with disruptions caused by repeated requests for summary decision after a hearing commences. Here, the hearing has not yet commenced so there has been no disruption. Additionally, the Commission’s rules do not limit the number of filings for summary decision.<sup>91</sup> Rather, the Commission has granted presiding officers authority to “take any action deemed necessary to assure that summary decision” is “not abused.”<sup>92</sup> If the Commission intended an absolute bar, it would have codified that prohibition as part of its *Summary Decision Procedures*.<sup>93</sup> When the Commission amended its summary decision rules five years later,<sup>94</sup> it opted not to foreclose multiple summary decision filings, and left the determination of appropriate safeguards against abuse to a presiding judge’s discretion.<sup>95</sup>

29. The Presiding Judge finds in his discretion that the Joint Motion under consideration is not an abuse of the summary decision rules. Each motion for summary decision was presumably filed in good faith under the existing circumstances when filed. The Presiding Judge always must give sufficient weight to the Commission’s concern that repeated motions may lead to significant delays.<sup>96</sup> However, other factors that a presiding judge must consider, particularly the need to preserve fairness for all parties, outweigh such concerns.

### **Fairness Requires Consideration of a Third Motion**

30. Maritime filed its first Motion for Summary Decision on August 31, 2012. That motion was not decided. The limited resources of the Commission’s sole Administrative Law Judge had to be directed to other matters in other proceedings. A second expanded Motion for Summary Decision was submitted by Maritime on May 8, 2013. Because the first motion had not been ruled upon and action was essential to avoid further delays, the second motion was treated as subsuming Maritime’s first motion.<sup>97</sup> The Presiding Judge ruled only upon the second motion on August 14, 2013.<sup>98</sup> In his ruling, the Presiding Judge found against Maritime. Since

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<sup>87</sup> Opposition at 39 (citing *Amendment of Section 1.251, Summary Decision Procedure*, Order, 66 F.C.C.2d 595, 595 ¶ 1 (1977)).

<sup>88</sup> *Id.* at 39-40.

<sup>89</sup> Opposition at 40.

<sup>90</sup> *Id.*

<sup>91</sup> See 47 C.F.R. § 1.251.

<sup>92</sup> 47 C.F.R. § 1.251(f).

<sup>93</sup> *Summary Decision Procedures* 34 F.C.C.2d at 490 ¶ 12.

<sup>94</sup> *Amendment of Section 1.251*, 66 F.C.C.2d at 595 ¶ 1.

<sup>95</sup> *Id.*

<sup>96</sup> Opposition at 39 (quoting *Summary Decision Procedures*, 34 F.C.C.2d at 490 ¶ 12).

<sup>97</sup> *Memorandum Opinion and Order*, FCC 13M-16 at 3 n.17.

<sup>98</sup> See *Memorandum Opinion and Order*, FCC 13M-16.

Mr. Havens was believed to lack counsel, summarily deciding an issue over his objection would contravene Commission policy disallowing summary decision against parties appearing *pro se* in complex cases.<sup>99</sup> Thus, the *pro se* status of a party was a significant factor in denying the motion.

31. Mr. Havens has since disclosed that the representations he made to the Presiding Judge earlier regarding his *pro se* status were incomplete at best. During the time period extending from the filing of the second Motion for Summary Decision to the release of the Presiding Judge's ruling on August 14, 2013, Mr. Havens was assisted by counsel affiliated with Technology Law Group, LLC, first by unidentified counsel and later by Mr. James Ming Chen.<sup>100</sup> Following release of the *Memorandum Opinion and Order*, no attempts were made by Mr. Havens, Mr. Chen, or anyone else to inform the Presiding Judge that the finding that Mr. Havens lacked counsel was erroneous. Instead, Mr. Havens reaped the benefits of a ruling premised on a finding that he likely knew, or should have known, was factually incorrect. Mr. Havens continued to make statements about the state of his legal representation that were misleading.<sup>101</sup>

32. To summarize, Maritime has indeed filed three motions for summary decision. The first motion was deemed superseded. The second motion, at least in part, was not decided on its merits but was erroneously dismissed. Fundamental fairness requires that the third motion, the Joint Motion, be considered in full. To ignore the attendant circumstances and reject the Joint Motion simply because Maritime has filed two prior summary decision motions would effectively deny Maritime and the Bureau any fair opportunity to seek summary decision and again reward Mr. Havens' *pro se* gamesmanship. This is not an acceptable resolution, and therefore, Mr. Havens' argument is rejected.

### *Pro-Se Debacle*

33. Mr. Havens asserts anew that the Joint Motion must be denied because he is participating *pro se*. He recites the usual bromide that summary decision "should not in fairness be used against parties who appear *pro se*" except in simple cases where the *pro se* party has personal knowledge of the facts.<sup>102</sup> Citing *Memorandum Opinion and Order*, FCC 13M-16, he argues that the Presiding Judge has already found that the litigation in this proceeding is complex, that Mr. Havens does not always have a firm grasp on motions filed by other parties, and that Mr. Havens struggles at times to communicate his understanding of important facts to the Presiding Judge.<sup>103</sup> Thus, Mr. Havens believes that as a purported *pro se* party, a summary decision over his objection would be inappropriate.

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<sup>99</sup> *Id.* at 7 ¶ 18 (citing *Summary Decision Procedures* 34 F.C.C.2d at 488 ¶ 6).

<sup>100</sup> Letter from Neil S. Ende, Esq., dated January 6, 2014; James Ming Chen's Notice of Limited or Special Appearance, dated January 6, 2014.

<sup>101</sup> *See, e.g.*, Proposed Schedule from Warren Havens at 3 ¶ 4 (filed August 27, 2013) ("I intend to have, but have not yet fully secured, legal counsel for the hearing and some prehearing matters.").

<sup>102</sup> Opposition at 104 (citing *Memorandum Opinion and Order*, FCC 13M-16 at 7 ¶ 18; *Summary Decision Procedures*, 34 F.C.C.2d at 488 ¶ 6).

<sup>103</sup> *Id.* at 104-05 (quoting *Memorandum Opinion and Order*, FCC 13M-16 at 8 ¶¶ 19-20).

34. Maritime and the Bureau set out numerous reasons why summary decision should be allowed. They assert that Mr. Havens is not the type of *pro se* party about whom the Commission was concerned when it discouraged the use of summary decision against parties who appear without benefit of counsel.<sup>104</sup> They note that Mr. Havens claims to “know[] far more about the facts, and probably more about the specific AMTS law . . . involved in [Issue G] . . . than any attorney at law in [or] outside of DC, or in the FCC.”<sup>105</sup> He “has filed hundreds of pleadings” with and without the assistance of counsel before the Wireless Bureau and the Commission for more than 10 years concerning the type of issues designated for hearing in this proceeding.<sup>106</sup> He plainly has the ability “to understand and respond to a motion for summary decision” in this proceeding.<sup>107</sup> They also note that Mr. Havens has adopted arguments regarding construction of Maritime’s site-based licenses that were prepared by counsel for him in an earlier summary decision.<sup>108</sup> Mr. Havens has also been repeatedly warned and discouraged by the Presiding Judge from participating in this proceeding *pro se*.<sup>109</sup> Finally, in a Reply to Mr. Havens’ Opposition, the Bureau argues that Mr. Havens would not be unfairly prejudiced by a summary decision since he has admitted to being assisted by counsel, “as to procedure and substance,” which amounts to broad legal representation.<sup>110</sup>

35. The Presiding Judge has previously cited the authority wherein the Commission has raised concerns about fairness when summary decision is used against parties who appear without counsel.<sup>111</sup> The Commission tempered this observation by noting that “parties normally appear without counsel in only the simplest of cases, in which they have personal knowledge of all matters of fact, and that in such cases, the capability of a party to understand and respond to a motion for summary decision may, in fairness, be left to the discretion of the presiding officer.”<sup>112</sup> From this language, it may be drawn that the Commission is primarily concerned that *pro se* litigants may face significant disadvantages because they lack legal training and are likely to struggle with tangled fact patterns or elaborate legal arguments. But those concerns about fairness do not exist here.

36. Mr. Havens has made the unorthodox decision to retain counsel for assistance, but not have counsel act on his behalf before the Presiding Judge, or to author his pleadings. In that way, Mr. Havens seeks both the benefits of counsel and the benefits available to a *pro se* litigant. Because his Opposition is self-evidently the product of substantial assistance from counsel as to both “procedure and substance,”<sup>113</sup> it is concluded that Mr. Havens is not entitled to *pro se* leniency. To grant Mr. Havens leniency when he already has access to the benefits of counsel, even if he chooses not to fully avail himself of those benefits, would award him an unfair

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<sup>104</sup> Joint Motion at 20 ¶ 36.

<sup>105</sup> *Id.* (citing Mr. Havens’ Further Notice of Appearance with Reasons at 6 ¶ 5 (filed May 24, 2013)).

<sup>106</sup> *Id.* at 20-21 ¶ 36 (citing *Applications of Mobex Network Services, LLC*, 19 FCC Rcd 24939 (WTB 2004); *Applications of Mobex Network Services, LLC*, 25 FCC Rcd 3390 (2010)).

<sup>107</sup> *Id.* at 21 ¶ 36 (citing *Summary Decision Procedures*, 34 F.C.C.2d at 488 ¶ 6).

<sup>108</sup> *Id.* at 21 ¶ 37 (citing Opposition to Motion for Partial Summary Decision at 9-14 (filed Sept. 17, 2012)).

<sup>109</sup> *Id.* at 21-22 ¶ 38 (citing *Order*, FCC 13M-16 at 8 ¶ 19).

<sup>110</sup> Enforcement Bureau’s Reply to Mr. Havens’ Opposition to Joint Motion for Summary Decision at 9 ¶ 13 (citing Havens-SkyTel First Motion Under *Order* 13M-19 to Reject Settlement, Proceed with the Hearing, and Provide Additional Relevant Discovery at 1 n.1 (filed on Dec. 2, 2013) (“Havens-SkyTel First Motion”)).

<sup>111</sup> *Summary Decision Procedures*, 34 F.C.C.2d at 488 ¶ 6.

<sup>112</sup> *Id.*

<sup>113</sup> Havens-SkyTel First Motion at 1 n.1.

advantage over opposing parties. It would also provide a mischievous precedent with which to circumvent the Commission's rules.

37. Mr. Havens is correct that the Presiding Judge previously ruled that fairness prevented summary decision from being decided against Mr. Havens because he was participating *pro se*.<sup>114</sup> But that determination is not *stare decisis* when the facts shift drastically. That ruling is not now applicable for two reasons. First, as previously discussed, the earlier ruling was flawed because it was premised on the erroneous finding that Mr. Havens lacked counsel. Mr. Havens is now known to be receiving assistance of counsel. Second, because the earlier ruling was based on a finding that the poor quality of Mr. Havens' opposition demonstrated that he was unable to adequately defend against a summary decision motion. The Presiding Judge found arguments in that opposition to be "confusing, sometimes indecipherable, and at other times wholly absent."<sup>115</sup> Then, miraculously, in his Opposition to the Joint Motion, Mr. Havens' arguments became clear, complete, and illustrative of a better understanding of summary decision.<sup>116</sup> While concerns about fairness to *pro se* litigants are always taken seriously, such a litigant will only be granted leniency where he is disadvantaged by his lack of representation, not where he can capably represent himself by utilizing readily available legal assistance. Mr. Havens' Opposition demonstrates that, with assistance of experienced counsel, Mr. Havens is equipped to understand complex procedural and factual issues, qualifying him as a fully informed and able participant in this complex proceeding.

### *Unfounded Accusations of Discovery Violations*

38. Mr. Havens argues that summary decision should not be granted because Maritime has failed to produce "relevant, discoverable documents that may potentially demonstrate the lack of timely construction and/or permanent discontinuance of service" of the licenses at issue.<sup>117</sup> The documents in question include the oft-referenced boxes of documents at first believed to have been destroyed, but later found in a storage facility,<sup>118</sup> "hundreds" of additional boxes stored "at Iron Mountain's facilities,"<sup>119</sup> as well as other records related to the operation of Maritime's stations. The Presiding Judge's ruling in *Order*, FCC 13M-22, found that Maritime did not conceal the existence of the "missing" boxes from any party in this proceeding.<sup>120</sup> Mr. Havens has simply failed to avail himself of opportunities in discovery to examine the documents he now tardily seeks.<sup>121</sup> His argument is again rejected.

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<sup>114</sup> *Memorandum Opinion and Order*, FCC 13M-16 at 7-8 ¶¶ 18-20.

<sup>115</sup> *Id.* at 8 ¶ 19.

<sup>116</sup> The difference in quality and style is so striking as to foster a suspicion that the Opposition was not authored by Mr. Havens, as he claims, but was ghostwritten by an attorney. The Presiding Judge is very concerned by the possibility that Mr. Havens filed a pleading in which he claimed to lack legal representation, while disguising counsel's involvement in drafting significant portions of that pleading. The Presiding Judge hoped to dispel these concerns in the conference held on January 17, 2014. However, Mr. Havens instead chose to make an unfounded, blanket claim of attorney-client privilege.

<sup>117</sup> Opposition at 60.

<sup>118</sup> *Id.* at 61, 95.

<sup>119</sup> *Id.* at 95.

<sup>120</sup> *Order*, FCC 13M-22 at 5-6 ¶¶ 11-12.

<sup>121</sup> *See id.*

39. Mr. Havens also argues that summary decision should not be granted because he lacks access to relevant facts withheld under a Protective Order.<sup>122</sup> He first asserts that Maritime has waived designating any information as confidential or highly confidential because an e-mail marked as confidential was sent to Mr. Havens.<sup>123</sup> He then claims that Maritime has spuriously labeled facts as confidential “in order to delay and impede Havens’s [sic] and SkyTel’s access to those facts.”<sup>124</sup> He believes such a misuse of the Protective Order calls into question all information redacted or otherwise withheld.<sup>125</sup> He also believes that the Commission has wrongfully denied him access to that information by denying several requests he filed *seriatim* under the Freedom of Information Act (FOIA).<sup>126</sup>

40. Maritime and the Bureau have at all times complied with the Protective Order. Contrary to accusations, no party in this proceeding has been shown to impermissibly withhold any documents. The parties by agreement have disclosed confidential and highly confidential information only to the Authorized Representatives who have signed the Protective Order.<sup>127</sup> The other parties have designated their counsel of record as Authorized Representative. Mr. Havens is not an Authorized Representative and his current counsel has made no attempt to become his Authorized Representative.<sup>128</sup> So, he is not entitled to access confidential or highly confidential information. Further, inadvertent disclosures do not waive confidentiality. Maritime’s decision to designate an e-mail addressed to Mr. Havens as confidential does not waive the safeguards of the instrument, as the Protective Order explicitly provides that disclosure of confidential material shall not be deemed a waiver of any entitlement of confidential treatment of such confidential material.<sup>129</sup>

41. To the extent that Mr. Havens believes that specific information should not be treated as confidential, he may request that the Presiding Judge review that information and determine whether or not it should be released.<sup>130</sup> Mr. Havens has not made such a request. Instead, Mr. Havens seeks discovery by serially filing FOIA requests with the Commission that are costly to the government and the impacted parties. He appeals each FOIA rejection, knowing full well the delay incident to appeals. The Presiding Judge need not wait for Mr. Havens’ FOIA appeals to be concluded before ruling on the Joint Motion. Mr. Havens has failed to utilize available tools for discovery that the Protective Order and the Commission’s rules provide. So he cannot be heard to complain. Mr. Havens’ argument for denial of the Joint Motion on grounds that he lacks access to confidential information must be rejected.

42. Attention now is turned to deciding substantive issues raised under Issue G.

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<sup>122</sup> *Protective Order*, FCC 11M-21.

<sup>123</sup> Opposition at 94.

<sup>124</sup> *Id.* at 95-96.

<sup>125</sup> *Id.* at 96.

<sup>126</sup> *Id.*

<sup>127</sup> *Protective Order*, FCC 11M-21 at 5 ¶ 6.

<sup>128</sup> See *id.* at 2 ¶ 2.

<sup>129</sup> See *id.* at 10 ¶ 15.

<sup>130</sup> See *id.* at 4 ¶ 3.

### Timely Construction

43. Section 80.49(a)(3) of the Commission's rules provides:

For site-based AMTS coast station licensees, when a new license has been issued or additional operating frequencies have been authorized, if the station or frequencies authorized have not been placed in operation within two years from the date of the grant, the authorization becomes invalid and must be returned to the Commission for cancellation.<sup>131</sup>

### *Watercom Findings*

44. Maritime and the Bureau argue that the Commission's findings of timely construction in *Waterway Communications System, Inc.*,<sup>132</sup> are *stare decisis* and leave no issues of material fact as to whether WHG750 was timely constructed.<sup>133</sup> This Commission precedent on the station's construction and operation is highly persuasive. The Commission found that "Watercom was required to meet a schedule of construction, regularly kept [the Commission] apprised of the status of construction and put the system into operation within the time [it] had allowed."<sup>134</sup> Thus, "there can be no question of spectrum hoarding or other dereliction in its inauguration of service."<sup>135</sup> This language leaves no doubt that WHG750 was timely constructed.

45. Mr. Havens argues that summary decision is inappropriate for the following reasons: there was no explicitly designated "fact finding proceeding;" the Commission did not review any evidence or assertions relating to Maritime meeting its construction obligations; and the Commission was insufficiently specific in its findings.<sup>136</sup> As the Commission stated in *Waterway*, not every factual dispute warrants resolution in a hearing.<sup>137</sup> A hearing in *Waterway* was unnecessary because the Commission had sufficient knowledge of the construction status of the licenses at issue to make its ruling, and it made specific findings. The Presiding Judge will not disregard the Commission's prior determinations on relevant factual issues where the complaining parties have failed to present any new, relevant facts that negate the Commission's determinations.

### *Mobex Findings*

46. Concerning the remaining 15 licenses, Maritime and the Bureau primarily argue that timely construction is demonstrated by the construction completion notifications for those

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<sup>131</sup> 47 C.F.R. § 80.49(a)(3).

<sup>132</sup> *Waterway Communications System, Inc.*, Memorandum Opinion and Order, 2 FCC Rcd 7317 (1987).

<sup>133</sup> Joint Motion at 8 ¶ 13.

<sup>134</sup> *Waterway Communications System, Inc.*, 2 FCC Rcd at 7319 ¶ 16.

<sup>135</sup> *Id.*

<sup>136</sup> Opposition at 62-63.

<sup>137</sup> *Waterway Communications System, Inc.*, 2 FCC Rcd at 7319 ¶ 16 (citing *Stone v. FCC*, 466 F.2d 316, 323 (D.C.Cir. 1972)).



facilities.<sup>138</sup> The Presiding Judge has concluded that examining those notifications is unnecessary, since WTB determined in *Mobex* by delegated authority that the stations were timely constructed.<sup>139</sup> In *Mobex*, Mr. Havens argued that the licenses at issue, which included KAE889, WRV374, and WHG750, should not be found to be timely constructed because of alleged defects in the activation notices.<sup>140</sup> WTB rejected his argument, asserting that a review of construction and operational information had confirmed that only facilities that were timely constructed remained in the Commission's license database.<sup>141</sup> As KAE889, WRV374, and WHG750 remained in the database, WTB found the facilities associated with those licenses to be timely constructed.<sup>142</sup> Mr. Havens has failed to present new facts that undermine WTB's conclusions.<sup>143</sup>

### *Statutory Interpretation*

47. Mr. Havens argues that site-based AMTS licenses granted prior to 2002 were required to ensure continuity of service in order for their facilities to be deemed constructed under Section 80.49.<sup>144</sup> He then cites the pre-2002 text of Section 80.475(a), which required that AMTS applicants proposing to serve inland waterways or specified portions of coastline to show how the proposed system would provide continuity of service.<sup>145</sup> He further argues that WTB recognized the continuity of service element of the construction requirement in its decision in *Dennis C. Brown, Esq.*<sup>146</sup> There, WTB commented that a scenario in which a geographic AMTS licensee interposed a station between two incumbent stations would not occur "if the incumbent licensee constructed its system in compliance with the then-existing requirement to maintain continuity of service."<sup>147</sup> He then cites to an engineering study seeking to show that on July 11, 2011, Maritime's facilities lacked the required continuity of service and thus should not be deemed to be constructed.<sup>148</sup>

48. Unfortunately, Mr. Havens has misread the Commission's rules. The continuity of service requirement of former Section 80.475(a) was distinct from the timely construction requirement of Section 80.49(a). As Mr. Havens recognizes in his Opposition, the underlying

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<sup>138</sup> Joint Motion at 8-10 ¶¶ 14-16.

<sup>139</sup> *Mobex Network Services, LLC*, Order, 19 FCC Rcd 24939 (WTB 2004).

<sup>140</sup> *Id.* at 24941 ¶ 6.

<sup>141</sup> *Id.* at 24941-42 ¶ 6.

<sup>142</sup> See *id.* at 24942 ¶ 6 ("We therefore conclude that it would not further the public interest to deny Mobex's renewal and transfer applications *en masse* based on defects in the activation notices for facilities that were in fact timely constructed." (emphasis added)).

<sup>143</sup> Mr. Havens alleges that the construction completion notifications are defective and thus raise factual issues that make summary decision unwarranted, Opposition at 65-67, but this allegation is not new. It was considered and rejected by WTB. *Mobex Network Services, LLC* 19 FCC Rcd at 24942 ¶ 6.

<sup>144</sup> Opposition at 47-48.

<sup>145</sup> 47 C.F.R. § 80.475(a) (2001); see also *RegioNet Wireless License, LLC*, Order, 15 FCC Rcd 16119, 16122 ¶ 7 (2000) ("[E]ach system must provide continuity of service to a specific navigable inland waterway or a substantial navigational area of coastline."). The continuity of service requirement was removed from Section 80.475 when the Commission adopted rules in 2002 to streamline licensing processes for AMTS stations by utilizing a geographic licensing system. *Amendment of Commission's Rules Concerning Maritime Communications*, Second Memorandum Opinion and Order and Fifth Report and Order, 17 FCC Rcd 6685 (2002).

<sup>146</sup> Opposition at 49 (citing *Dennis C. Brown, Esq.*, Letter, 24 FCC Rcd 4135, 4136 n.7 (2009)).

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 76-83; Opposition, Exhibit D.1.

purpose of the timely construction requirement is to ensure that service is provided to the public within a reasonable time after grant of a license.<sup>149</sup> But the continuity of service requirement did not serve that goal. Rather, the goal of continuity of service, *inter alia*, was to enable a vessel to navigate a waterway while maintaining radio contact with an AMTS station.<sup>150</sup> The text of Section 80.49(a)(3) recognizes that distinction, as it provides that AMTS stations or frequencies face automatic cancellation for lack of timely construction by the construction deadline, but makes no mention of the continuity of service requirement.<sup>151</sup> Thus, a station is deemed constructed when it is placed in operation, without regard to whether continuity of service is provided. In other words, a licensee under the pre-2002 rules that failed to provide continuity of service as required by Section 80.475(a) at the construction deadline would not have its license automatically canceled under Section 80.49(a). Furthermore, unlike Section 80.49(a), Section 80.475(a) contained no language requiring that a license would be returned to the Commission for cancellation if its requirements were not satisfied.<sup>152</sup>

49. Even assuming that Mr. Havens' view of the Commission's rules could be correct, summary decision remains permissible. The engineering study cited by Mr. Havens purports to determine the service contours of the facilities associated with call sign WRV374 as they existed on July 11, 2011.<sup>153</sup> However, under Mr. Havens' interpretation of the pre-2002 rule, the issue here is not whether WRV374 provides continuity of service today, but whether continuity of service was provided at the construction deadline. The study does not attempt to determine the service contours of WRV374 as they existed at the construction deadline. Therefore, because it is not probative of whether the WRV374 facilities were timely constructed, the engineering study raises no issues of material fact as to the construction aspect of Issue G.

50. Finally, the Presiding Judge has no reason to conclude that the Commission and WTB erred in their readings of the Commission's rules, their analysis of the record, or their findings as to timely construction. Accordingly, it is found that all 16 licenses were timely constructed, and that summary decision in Maritime's favor must be granted on the construction aspect of Issue G.

### **Permanent Discontinuance**

51. Issue G also requires a determination of whether any of Maritime's site-based licenses is subject to automatic cancellation "because operation of the stations has been permanently discontinued."<sup>154</sup>

52. Section 1.955(a)(3) of the Commission's Rules provides that:

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<sup>149</sup> Opposition at 52-53 (citing *Paging Systems, Inc.*, Order, 15 FCC Rcd 23983, 23984 ¶ 4 (WTB PSPWD 2000)).

<sup>150</sup> *Applications of Fred Daniel d/b/a Orion Telecom and Paging Systems, Inc.*, Memorandum Opinion and Order, 13 FCC Rcd 17474, 17478 ¶ 10 (WTB PSPWD 1998).

<sup>151</sup> 47 C.F.R. § 80.49(a)(3). This same language was used prior to the Commission's amendment of the AMTS rules in 2002. See 47 C.F.R. § 80.49(a)(2) (2001).

<sup>152</sup> See *Paging Systems, Inc. and Maritime Communications/Land Mobile LLC*, Order, 27 FCC Rcd 8028, 8030 ¶ 5 (WTB MD 2012).

<sup>153</sup> Opposition, Exhibit D.1.

<sup>154</sup> HDO at 6546 ¶ 61 (2011).

Authorizations automatically terminate, without specific Commission action, if service is permanently discontinued. The Commission authorization or the individual service rules govern the definition of permanent discontinuance for purposes of this section.<sup>155</sup>

Neither the authorizations at issue, nor the rules governing AMTS licenses, provide further guidance as to the meaning of “permanent discontinuance.” Since no definition of “permanent discontinuance” is provided, factual and legal determinations of permanent discontinuance must be made on a case-by-case basis.<sup>156</sup>

53. The Presiding Judge has found that the definition the phrase as used in Section 1.955(a)(3) is its plain meaning: operation of a service may not indefinitely lapse or else its authorizations will automatically terminate.<sup>157</sup> To successfully demonstrate that the operation of a service has permanently discontinued, a party must show by reliable evidence that the licensed station is no longer operating. Further, that party must demonstrate that the failure to operate the station is not temporary.<sup>158</sup> Thus, in seeking a favorable summary decision, a licensee may show that a service has not been permanently discontinued by presenting evidence that the station is currently operating. If a licensee cannot show that the station is currently operating, it may still successfully demonstrate that the service has not permanently discontinued by showing that it is taking concrete steps that are likely to result in the restoration of operations.<sup>159</sup> So, Maritime and the Bureau must provide evidence that operations are either ongoing or will resume under an existing plan at the locations specified by the authorizations.

54. Genuine issues of material fact remain as to the operational status of all 16 licensed facilities. These facilities have all discontinued operations. There is insufficient credible and reliable evidence to demonstrate that there are no genuine issues of material fact as to whether discontinuance of any of the 16 facilities’ operations is temporary. Further analysis and discussion are set forth below.

### *Admitted Discontinuance of Operations*

55. Maritime and the Bureau concede that 15 licensed locations currently are not operating. These include: six locations specified in the licenses that are subject to a spectrum lease agreement with Pinnacle;<sup>160</sup> a location specified by WHG750, which is subject to a lease agreement with Duquesne;<sup>161</sup> the location specified by KAE889-13, which is subject to a lease

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<sup>155</sup> 47 C.F.R. § 1.955(a)(3).

<sup>156</sup> *Northeast Utilities Service Co.*, 24 FCC Rcd. 3310, 3314 ¶ 10 (WTB MD 2009) (*recon. pending*).

<sup>157</sup> *Memorandum Opinion and Order*, FCC 13M-16 at 11 ¶ 27; *see also Northeast Utilities Service Co.*, 24 FCC Rcd at 3314 ¶ 10 (agreeing that “Part 80 licensees may not cease operations indefinitely without the license terminating for permanent discontinuance”).

<sup>158</sup> *See Mobex Network Services, LLC*, 25 FCC Rcd 3390, 3395 ¶ 10 (2010) (concluding that evidence that a facility lacked equipment for years was sufficient to demonstrate permanent discontinuance).

<sup>159</sup> *See Northeast Utilities Service Co.*, 24 FCC Rcd at 3314 ¶ 10 (concluding that ongoing negotiations with the Freedom Tower property management company regarding site availability sufficiently demonstrated that discontinuance was not yet permanent).

<sup>160</sup> Joint Response at 2 ¶ 3 (addressing licenses WRV374-14 (Selden), WRV374-15 (Verona), WRV374-16 (Allentown), WRV374-18 (Valhalla), WRV374-25 (Perrinville), and WRV374-33 (One World Trade Center)).

<sup>161</sup> *Id.* at 3 ¶ 3.

agreement with Evergreen;<sup>162</sup> the five locations specified in the licenses that are subject to a spectrum lease agreement with Puget;<sup>163</sup> and the inoperative locations specified by call signs WRV374-35 and WRV374-40 that are being actively marketed with Spectrum Bridge.<sup>164</sup>

56. The licensed site specified by call sign KAE889-3 (Livingston Peak) is also not operating. A Declaration of Kurt Gazow, Manager for Information Technology of Evergreen Public Schools, states that Evergreen is operating its network using space it leased at FCC Tower #1035585.<sup>165</sup> The Commission's Antenna Structure Registration database provides that the coordinates for this tower are 45-35-31.0 N, 122-26-20.7 W. However, the coordinates for KAE889-3 provided by the Commission's Universal Licensing System are 45-40-32.4 N, 122-22-37.3 W.<sup>166</sup> Evergreen is thus operating from a fill-in site. There is no evidence in the record that the licensed facility is operating.

### *Permanence*

57. As noted, Maritime and the Bureau concede that many of the licensed facilities are not operating. Therefore, they argue that "the question before the Presiding Judge is whether any discontinuance of operations at these facilities should be considered permanent."<sup>167</sup> Maritime and the Bureau are able to provide evidence of efforts to resume operations at only two of the 16 dormant licensed facilities: WRV374-75 (Rehoboth) and WRV374-40 (Hamden). But proof of the nature of the discontinuance has not been sufficient to show discontinuance to be temporary. Also, they do not provide any evidence regarding efforts to resume operations at 14 of the 16 facilities. Having considered the whole of the evidence presented on discontinuance of the facilities, it is concluded that there are substantial questions of material fact remaining that must be tried.

### *WRV374-35 (Rehoboth) and WRV374-40 (Hamden)*

58. In a sworn declaration, Mr. John Reardon, a former officer of Maritime with relevant knowledge of Maritime's operations, alleges that it was never the intention of Maritime to permanently discontinue operation of WRV374-35 and WRV374-40.<sup>168</sup> Rather, since 2008, Maritime has been actively marketing service in these two sites to potential users such as AMTRAK, the Metro North Rail Road, and the Massachusetts Bay Transportation Authority.<sup>169</sup>

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<sup>162</sup> *Id.*

<sup>163</sup> Joint Response at 5 ¶ 7 (addressing KAE889-4 (Rainier Hill), KAE889-20 (Mount Constitution), KAE889-30 (Gold Mountain), KAE889-34 (Capital Peak), and KAE889-48 (Tiger Mountain)).

<sup>164</sup> See Joint Motion at 19-20 ¶ 34.

<sup>165</sup> Joint Motion, Exhibit 17 at 2 ¶ 2.

<sup>166</sup> As the Presiding Judge takes official notice of these material facts, Maritime and the Bureau are granted the opportunity to file a response within five business days of release of this *Memorandum Opinion and Order* showing the contrary. See 47 C.F.R. § 1.203.

<sup>167</sup> Joint Response at 5-6 ¶ 7.

<sup>168</sup> Joint Motion, Exhibit 20 at 1-2.

<sup>169</sup> *Id.* at 2.

59. Maritime and the Bureau appear to rely on guidance provided by WTB in *Northeast Utilities Service Co.*<sup>170</sup> That proceeding involved the issue of whether service provided via a licensed AMTS transmitter formerly located on the North Tower of the World Trade Center had permanently discontinued. WTB found that the discontinuance was not permanent due to evidence that the licensee was participating in ongoing negotiations with the management company for New York City's Freedom Tower,<sup>171</sup> which demonstrated due diligence in securing space to rebuild the station.<sup>172</sup> The licensee had also continued to provide service via a fill-in station located in Times Square.<sup>173</sup> Maritime and the Bureau appear to suggest that WRV374-35 and WRV374-40 should be found to have not permanently discontinued operations because Maritime has exercised due diligence by actively marketing the availability of service at those two sites.

60. The facts in *Northeast Utilities Service Co.* can be distinguished from the facts concerning the Rehoboth and Hamden sites. In *Northeast Utilities Service Co.*, the licensee could not utilize the licensed site because it was physically destroyed. However, service was still being provided *via* a fill-in site. Service from the licensed site could be resumed once the licensee had reached an agreement that allowed its use and the site was rebuilt. By negotiating towards an agreement, the licensee was taking concrete steps to restore service from the licensed site. This is significantly different from the instant case. No service is currently provided by utilizing the licensed spectrum associated with WRV374-35 or WRV374-40. Nor are there any physical obstacles that prevent service from being provided from either site. Rather, business reasons led Maritime to decide to not operate these facilities and instead market them for future use.<sup>174</sup> Unlike the scenario reported in *Northeast Utilities Service Co.*, Maritime's marketing of the locations is not a convincing, concrete step towards restoring operations. It would be pure speculation as to whether Maritime's marketing efforts may lead to resuming operations on a date uncertain at the licensed facilities.<sup>175</sup> Such speculative uncertainty precludes a finding that there is no genuine issue of material fact as to whether WRV374-35 or WRV374-40 has permanently discontinued operations.

### *The Use of Fill-Ins*

61. Maritime and the Bureau ask the Presiding Judge to credit the use of licensed spectrum at fill-in sites in determining whether discontinuance of service at licensed facilities has become permanent.<sup>176</sup> However, the operational status of a station is determined with respect to the licensed site and not the operation of fill-in sites that may exist within the licensed spectrum.<sup>177</sup> It is recognized that temporary utilization of licensed spectrum by fill-in sites tends to show that discontinuance of a service is not permanent. But such proof would become

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<sup>170</sup> *Northeast Utilities Service Co.*, 24 FCC Rcd. 3310 (WTB MD 2009) (*recon. pending*).

<sup>171</sup> *Id.* at 3314 n.40.

<sup>172</sup> *Id.* at 3314 ¶ 10.

<sup>173</sup> *See id.*

<sup>174</sup> Joint Motion at 19 ¶ 34.

<sup>175</sup> Rather, the fact that these locations have been marketed for more than five years without success strongly suggests that discontinuance is permanent.

<sup>176</sup> Joint Response at 6 ¶ 8.

<sup>177</sup> *Northeast Utilities Service Co.*, 24 FCC Rcd at 3314 n.39; *Mobex Network Services, LLC*, 25 FCC Rcd at 3395 n.48.

persuasive only where it is accompanied by evidence that operations have not been permanently discontinued at the locations specified by the Commission's authorizations. Operations at the fill-in sites utilized by Pinnacle, Duquesne, Puget, and Evergreen do not render operative the inactive facilities licensed to Maritime by the Commission. Significant factual questions still need to be resolved as to whether service will resume at the licensed facilities. For that reason, the taking of further evidence at hearing is necessary.

### *Inconclusive Evidence of Operation*

62. Maritime and the Bureau offer additional scattered evidence that is relevant but inconclusive as to operational status. They assert that each licensed location has retained equipment that is not being used but is capable of resuming operations.<sup>178 179</sup> Precedent instructs that the failure of a licensee to maintain equipment that is capable of resuming operations constitutes permanent discontinuance of operations.<sup>180</sup> However, such precedent fails to prove that a licensed facility that is inoperative should not be deemed permanently inoperative solely because equipment has been retained. Equipment alone is not enough. Even if a facility is capable of operation, service from that site will permanently discontinue should the licensee not act to resume operations. Summary decision cannot be granted without reliable evidence that Maritime or its lessees are taking concrete steps that are calculated to result in operations resuming at the licensed facilities. Clearly, significant factual questions remain that require proof by one or more of the following: documentation, testimony, cross-examination, or expert opinion (if available). Proposed evidentiary findings after hearing would also be required.

### *Interfering Stations*

63. Maritime and the Bureau also ask that the Presiding Judge take into account facts showing that Maritime cannot operate several licensed facilities without interfering with the operations of other licensed facilities that are subject to spectrum lease agreements.<sup>181</sup> The Bureau argues that this discontinuance should not be deemed permanent because it is "an unintended result of Maritime's leasing of its authorized spectrum and because the length of the discontinuance is essentially defined by the period of the lease agreements," which gives the discontinuance a limited duration.<sup>182</sup> "[I]f and when Maritime (or its successor) has an opportunity to renew those spectrum lease agreements, it will have an option to begin operating its facilities again."<sup>183</sup>

64. When a licensee enters into a spectrum lease agreement, it remains responsible for ensuring that the operation of licensed facilities complies with Commission rules.<sup>184</sup> If Maritime enters a spectrum lease agreement that somehow prevents its site-based licensed facilities from operating as required under the Commission's rules, it acts at its peril. The movants' argument, that Maritime should be excused from complying with the Commission's rules because it has

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<sup>178</sup> Joint Motion at 13 ¶ 21.

<sup>179</sup> No findings are made as to the validity of these assertions at this time.

<sup>180</sup> *Mobex Network Services, LLC*, 25 FCC Rcd at 3395 ¶ 10.

<sup>181</sup> Joint Response at 7 ¶ 9.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> 47 C.F.R. § 1.9020(b)(1).

voluntarily entered into spectrum licensing agreements that disallows compliance with those rules, is unpersuasive and defies reason. Perhaps an exception could be requested of the Commission.

65. The limited duration of the spectrum lease agreements do not alone prove that the licensed facilities in question have not permanently discontinued. Per the movants' description, it is not certain, or even likely, that the licensed facilities will resume service at the end of the agreed leasing period. Forgoing operations at the fill-in sites so operations can resume at the licensed facilities is little more than an "option" that Maritime may or may not choose to exercise. The existence of an "option" to resume service at the licensed facilities, without further evidence showing that Maritime *likely will* restart operations, leaves too much to speculation to serve as probative factual evidence as to whether the discontinuance of Maritime's licensed facilities is permanent.

### ***Public Safety and the Public Interest***

66. Finally, Maritime, the Bureau, and other parties argue that the Presiding Judge should take the public interest into account because much of the spectrum that Maritime has leased to third parties is used "for critical infrastructure and public safety communications."<sup>185</sup> For instance, Pinnacle argues that the public interest requires that the Presiding Judge's decision should protect its ongoing operations which use Maritime spectrum or else "the State of New Jersey will incur financial, operational, and life safety risks."<sup>186</sup> The moving parties should be aware that the Presiding Judge has been tasked to "determine whether Maritime constructed or operated any of its stations at variance with sections 1.955(a) and 80.49(a) of the Commission's rules."<sup>187</sup> Public safety interests served by the use of the licensed spectrum are not relevant to deciding that issue. Further, the Commission has not delegated the authority to waive any Commission rules to the Presiding Judge.<sup>188</sup>

### **A Troubling Joint Stipulation**

67. In their Joint Stipulation, the movants state that "Maritime is in the process of filing applications to modify its authorizations to delete therefrom" 73 site-based licenses.<sup>189</sup> Both parties argue that, as a result, Issue G becomes moot as to those licenses.<sup>190</sup> However, the movants guardedly assert that the proposed cancellation "does not constitute an admission on the part of either Maritime or the Bureau on the merits of Issue G as to the [construction and operational status of the] foregoing site-based licenses, *but is being done solely to expedite resolution of Issue G and eliminate or minimize the need for further litigation.*"<sup>191</sup>

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<sup>185</sup> Joint Response at 6 ¶ 8. Joint Motion, Exhibit 5 at 4.

<sup>186</sup> Pinnacle Response at 5 ¶ 15 (filed on April 9, 2014).

<sup>187</sup> HDO at 6547 ¶ 62.

<sup>188</sup> This concludes discussion of substantial fact issues. The permanent discontinuance aspect of the Joint Motion is being denied. So there is no need to address Mr. Havens' arguments for denying summary decision on other grounds.

<sup>189</sup> Joint Stipulation at 2-4 ¶ 3.

<sup>190</sup> Bureau's Reply at 3 ¶ 3.

<sup>191</sup> *Id.* at 4 ¶ 4 (emphasis added).

68. Mr. Havens asserts that in the relevant parallel bankruptcy case,<sup>192</sup> the crux of Maritime's First Amended Plan of Reorganization ("Plan") contemplates that Maritime pursue the transfer of *all* of Maritime's licenses to Choctaw so that they could be sold by Choctaw for the benefit of creditors.<sup>193</sup> Mr. Havens points out that the Joint Stipulation would result in a material modification of the Plan.<sup>194</sup> He further argues that any "agreement purporting to surrender a considerable portion of Maritime's FCC license in exchange for, among other things, a termination of proceedings" requires prior approval of a Bankruptcy Court after notice and hearing.<sup>195</sup> Mr. Havens argues that the Bankruptcy Code requires disclosure to creditors of adequate information on a proposed modification so they may determine if they should withhold or withdraw acceptance of the Plan.<sup>196</sup> In response, the Bureau argues that Mr. Havens' position is irrelevant because it is premised on his misinformed belief that the Joint Motion is a proposal for a consent decree.<sup>197</sup> But that is of no significance on disclosure to creditors. The Bureau also clarifies that it does not seek summary decision with regard to the authorizations specified in the Joint Stipulation, but that it only requests that the Presiding Judge deem Issue G moot with respect to those authorizations.<sup>198</sup> However, the Bureau is silent on the critical questions of whether the movants are deviating from the Plan and whether creditors have received sufficient notice of Maritime's possible deviations.

69. The broad strokes of the Havens arguments are interesting, insightful, and in part persuasive. His view that the Joint Motion reads as a proposal for a consent decree is erroneous, but not essential to the crux of his argument. He raises the point that the Joint Stipulation would delete 73 site-based facilities from Maritime's universe of licenses. These licenses are assets otherwise available to pay Maritime's creditors, having value estimated in the tens of millions of dollars.<sup>199</sup> That use of Maritime's assets does not appear to have been approved by the Bankruptcy Court. The Plan contemplated and apparently approved by the Bankruptcy Court is simply one wherein Maritime "will transfer, assign, and sell to [Choctaw] Holding *all* of [Maritime's] right, title, and interest in its [FCC licenses]."<sup>200</sup> The Plan clearly contemplates that Choctaw will market and sell all of those licenses and then distribute resulting revenue, products, and proceeds to creditors.<sup>201</sup> The Plan does not contemplate canceling any licenses for the benefit of Maritime in expediting the resolution of this proceeding, or for the purpose of minimizing the need for further litigation.<sup>202</sup>

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<sup>192</sup> *In re Maritime Communications/Land Mobile, LLC*, Case No. 11-13463-DWH (Bankr. N.D. Miss., filed Aug. 1, 2011).

<sup>193</sup> Opposition at 27-28.

<sup>194</sup> *Id.* at 27.

<sup>195</sup> *Id.* (citing 11 U.S.C. § 1127(b)). The Bankruptcy Court having jurisdiction here is the United States Bankruptcy Court for the Northern District of Mississippi.

<sup>196</sup> *Id.* at 28.

<sup>197</sup> Bureau's Reply at 2-3 ¶ 2.

<sup>198</sup> *Id.* at 3 ¶ 3.

<sup>199</sup> See *In re Maritime Communications/Land Mobile, LLC*, First Amended Disclosure Statement for Maritime Communications/Land Mobile, LLC, Exhibit A at 6 (July 27, 2012).

<sup>200</sup> *In re Maritime Communications/Land Mobile, LLC*, First Amended Plan of Reorganization at 10 (Sept. 25, 2012) (emphasis added).

<sup>201</sup> *Id.*

<sup>202</sup> Joint Stipulation at 4 ¶ 4. The inconvenient litigation is not of the nature of a private "strike suit." It was initiated by the Commission based upon Maritime's conduct as a licensee.



70. Maritime's stipulated cancelation of 73 of 89 site-based licenses amounts to the surrender of 82% of all site-based licenses that remain at issue in this proceeding. The Presiding Judge is concerned that this would be a significant deviation from the Plan. Just a cursory comparison of the licenses listed in Schedule B23 of Exhibit A to the First Amended Disclosure Statement with the licenses listed in the troubling "Limited Joint Stipulation Concerning Issue G Licenses" that accompanies the Joint Motion shows that Maritime and the Bureau would delete 71 of the 127 site-based licenses listed in the Plan that are intended to be included among Maritime's assets.<sup>203</sup> By seeking to delete 56% of its site-based licenses, Maritime would preclude Choctaw from selling them for the benefit of creditors. That possible deviation from the Plan filed with the Bankruptcy Court would deny creditors the benefit of significant assets solely to facilitate this litigation.<sup>204</sup> There is no indication that the Bankruptcy Court and the creditors approved, or would approve, the cancellation of the assets that are identified in the Joint Stipulation. There is no indication that the Joint Stipulation was even filed and presented to the Bankruptcy Court.

71. The Presiding Judge must decline to rule on whether cancellation of Maritime's licenses *via* the Joint Stipulation runs afoul of bankruptcy laws or violate the current Plan. The Bankruptcy Court has jurisdiction to decide such issues. However, without further explanation or specific approval by the Bankruptcy Court, the Joint Stipulation cannot be accepted here. Nor, in light of this argument newly raised by Mr. Havens, can the Presiding Judge now accept the May 31, 2012, Limited Joint Stipulation Between Enforcement Bureau and Maritime as to the deletion of several licenses.<sup>205</sup> Therefore, for the reasons stated above, stations KA98265, KCE278, KPB531, KUF732, WFN, WHW848, WHX877, WRD580, KAE889 (Locations 8, 14, 26, 27, 28, 33, 37, 39, 40, and 44), WHG 693 (Block A), WHG 701-703 (Block A), WHG 705-754 (Block A), and WRV374 (Locations 2, 3, 17, 24, 27, 28, 29, 31, and 36) are no longer be deemed canceled for purposes of Issue G.

72. There are significant concerns that permitting these licenses to be canceled would be contrary to the public interest, and/or would undermine the Plan as contemplated or approved by the Bankruptcy Court. The Presiding Judge will reconsider this ruling only if the Bankruptcy Court makes an informed and specific ruling confirming that the surrender of Maritime's licenses as contemplated by the Joint Stipulation is permitted under the Bankruptcy Code, is allowed by Court procedures and practices, is authorized by the Plan, and is approved by the Bankruptcy Court. Failing to obtain such a ruling from the Bankruptcy Court, Maritime will be expected to present evidence at hearing as to the construction and operational status of each of

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<sup>203</sup> The remaining two site-based licenses that Maritime and the Bureau seek to delete, WHV733-2 and WHV733-3, are omitted from Schedule B23 entirely. The omission of such assets from filings with the Bankruptcy Court creates further concerns about whether full disclosures have been made.

<sup>204</sup> The Presiding Judge is additionally concerned that Maritime may not have adequately disclosed the risks in this proceeding to its creditors. Maritime's Third Amended Disclosure Statement only makes passing references to Issue G. It does not explain that the outcome of this proceeding may result in the automatic cancelation of some or all of Maritime's site-based authorizations. *In re Maritime Communications/Land Mobile, LLC*, Third Amended Disclosure Statement for Maritime Communications/Land Mobile, LLC at 17, 31 (emphasis added). Instead, Maritime implies that Issue G can be resolved via the *Second Thursday* doctrine. *Id.* at 32. As the Presiding Judge has repeatedly found, Issue G does not involve Maritime's basic qualifications to hold a license and thus cannot be resolved via the *Second Thursday* doctrine. In the Presiding Judge's view, this misstatement by Maritime of the Commission's policies leaves the creditors without a full understanding of the possible outcomes of this proceeding.

<sup>205</sup> See *Memorandum Opinion and Order*, FCC13M-16 at 9 ¶¶ 21, 13 ¶¶ 31-33.

the 73 licenses, as well as those that were the subject of its May 31, 2012, Limited Joint Stipulation.

### Orders

73. For the foregoing reasons, **IT IS ORDERED** that the Joint Motion of Enforcement Bureau and Maritime for Summary Decision on Issue G **IS GRANTED AS TO THE TIMELY CONSTRUCTION ASPECT OF ISSUE G** for authorizations WHG750, KAE889-3 (Livingston Peak), KAE889-4 (Rainier Hill), KAE889-13 (Portland), KAE889-20 (Mount Constitution), KAE889-30 (Gold Mountain), KAE889-34 (Capital Peak), KAE889-48 (Tiger Mountain), WRV374-14 (Selden), WRV374-15 (Verona), WRV374-16 (Allentown), WRV374-18 (Valhalla), WRV374-25 (Perrinville), WRV374-33 (One World Trade Center), WRV374-3S (Rehobeth), and WRV374-40 (Hamden).

74. **IT IS FURTHER ORDERED** that the Joint Motion of Enforcement Bureau and Maritime for Summary Decision on Issue G **IS DENIED** in all other respects.

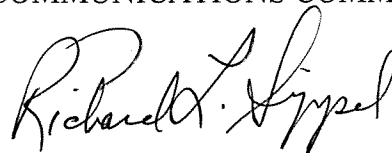
75. **IT IS FURTHER ORDERED** that the Enforcement Bureau and Maritime shall have five days from the date of release to respond to the Presiding Judge's taking of official notice of certain facts in this *Memorandum Opinion and Order*.<sup>206</sup>

76. **IT IS FURTHER ORDERED** that the Limited Joint Stipulation Concerning Issue G Licenses of the Enforcement Bureau and Maritime **IS REJECTED**.

77. **IT IS FURTHER ORDERED** that to the extent any of the foregoing licenses were canceled by ruling of the Presiding Judge, authorizations KA98265, KCE278, KPB531, KUF732, WFN, WHW848, WHX877, WRD580, KAE889 (Locations 8, 14, 26, 27, 28, 33, 37, 39, 40, and 44), WHG 693 (Block A), WHG 701-703 (Block A), WHG 705-754 (Block A), and WRV374 (Locations 2, 3, 17, 24, 27, 28, 29, 31, and 36) **ARE NO LONGER DEEMED CANCELED** for purposes of Issue G.

78. **IT IS FURTHER ORDERED** that the Joint Motion to Strike Havens' Response to the Joint Response of the Enforcement Bureau and Maritime to *Order*, FCC 14M-9 **IS GRANTED** and the Haven's Response **IS STRUCK**.

FEDERAL COMMUNICATIONS COMMISSION<sup>207</sup>



Richard L. Sippel  
Chief Administrative Law Judge

<sup>206</sup> See *supra* n.166 and accompanying text.

<sup>207</sup> Courtesy copies of this *Order* sent by e-mail on issuance to each counsel and to Mr. Havens.